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Robert R. Corbin

December 13, 1982

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### ARIZONA ATTORNEY GENERAL

Mr. John Patrick Lyons  
Stompoly & Even, P.C.  
Attorneys at Law  
Magdalena Building, Suite 370  
120 West Broadway, United Bank Plaza  
Tucson, AZ 85701

Re: I82-135 (R82-126)

Dear Mr. Lyons:

This is in response to your opinion dated August 13, 1982, to the Superintendent of the Sunnyside Unified School District No. 12, concerning the use of "prevailing wage scales" in school district construction contracts. The following is a revision of your opinion.

The Legislature established in Article 2, Chapter 3, Title 34, Arizona Revised Statutes, a uniform comprehensive statewide scheme for the specification of minimum wages in calls for bids and contracts for public works for the State and its political subdivisions. Under the statutory scheme, only the Industrial Commission is authorized to establish the prevailing rate of wages for laborers on public works projects in Arizona. See A.R.S. §§ 34-321, 34-322 and 34-325.

If the governing boards of school districts are authorized to specify minimum wages in their public works contracts in a manner other than that prescribed in Title 34, the authority to do so must be granted to the boards by specific legislation that would serve as an exception to the scheme that the Legislature enacted in Title 34. The authority of governing boards relating to contracts for public works appears in A.R.S. §§ 15-341, 15-342 and 15-364. These statutes do not evidence any intention of the Legislature that school district boards are authorized or directed to take any action regarding the specification of minimum wages in their public works contracts.

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Therefore, our opinion is that school district governing boards lack authority to specify in their bids and contracts for public works any rate of wage other than that determined by the Industrial Commission under Title 34 and that, in the absence of the Industrial Commission's determination, a school district board may not include in its bids and contracts for public works any reference to a minimum wage for the work to be performed.<sup>1/</sup>

Sincerely,



BOB CORBIN

Attorney General

BC:lm

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1. We note that A.R.S. § 34-324.A, which prescribes the method by which the Industrial Commission was authorized to establish the prevailing rates of wages for public works projects, has been declared unconstitutional, thereby rendering the Title 34 scheme unworkable. Industrial Commission v. C & D Pipeline, Inc., 125 Ariz. 64, 607 P.2d 383 (Ct. App. 1964). However, the fact that the Title 34 scheme is no longer workable (in the absence of corrective legislation) does not authorize any State agency or political subdivision other than the Industrial Commission to establish prevailing rates of wages for public works contracts.

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August 13, 1982

**EDUCATION OPINION**  
**ISSUE NO LATER THAN**

10-14-82

8-17-82 *pc*  
LASSEN/KAMIN

R82- 126

PERSONAL AND CONFIDENTIAL

Mr. Fred T. Bull, Superintendent  
Sunnyside Unified School District No. 12  
Post Office Box 11280  
Tucson, Arizona 85734

Re: Sunnyside Minimum Wage Scale

Dear Mr. Bull:

This office is in receipt of a letter dated August 3, 1982 (received August 5, 1982) from Mr. Hector M. Encinas, Director of Business Affairs, Sunnyside Unified School District No. 12. A copy of that letter is attached to this opinion. As I understand the aforementioned communication, the District has four questions and they are as follows:

1. "Does the Board of Education/Sunnyside Unified School District have the right and therefore is on legal grounds to specify that contractors pay its employees the 'City of Tucson's Prevailing Wage Scale' for projects in Sunnyside Unified School District?"

2. "If not to the above, can the District specify and obligate contractors to pay their employees based on a 'Sunnyside Unified School District' prevailing wage scale?"

3. "If yes to #2, what steps and actions are required to establish a 'Sunnyside Unified School District' prevailing wage scale?"

4. "If yes to #2, do you foresee any legal complications and/or challenges from contractors if we receive a bid from a contractor who is not going to pay the prevailing wage scale that is lower than the low bidder who has agreed to pay the prevailing wage?"

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The answers to those questions are as follows:

1. No.

2. Yes.

3. A meeting of the Board of Sunnyside Unified School District No. 12 pursuant to appropriate public notice announcing the Board's intent to establish a policy of minimum wages on construction projects. A finding by the Board that such a policy is in the best interest of the District. A resolution adopted by an appropriate vote of the Board establishing the exact minimum wage scale and instructions to the Superintendent to include said scale in the bid specification released on Sunnyside projects. Finally, a clearly worded instruction to the bidders that such a minimum scale is required.

4. Yes.

The above answers are based upon the reasoning set forth below. For the sake of simplicity, the reasoning in reference to each question is proceeded by the number that question bears above.

1. Use of Tucson Wage Scale: The use of a third party's wage scale is most probably a violation of the Arizona Constitution. The Arizona Courts take the constitutional view of a strict separation of powers insofar as the establishment of a wage scale is concerned. The Arizona Court of Appeals in Industrial Commission v. C & D Pipeline, 607 P.2d 383, 125 Ariz. 64 (Ariz.App. 1979), noted that:

"It is a well established theory that a legislature may not delegate its authority to private persons over whom the legislature has no control....." Id. at 385.

I believe the case to be equally applicable to the District's use of whatever prevailing wage rate is employed by the City of Tucson. Based upon the above cited case, I believe there is a better even chance that the Arizona Courts would hold that if Sunnyside Unified School District No. 12 employed the prevailing wage of a third party, even though that third party was a governmental entity, that such a prevailing wage would be declared to be unconstitutional and in violation of

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the legislative functions vested in the School District Board.

2. Sunnyside Wage Scale: The Sunnyside School District Board is granted wide powers by statute, including the power to let bids for the construction of buildings (A.R.S. §15-341(a)), subject only to the bidding procedures set forth in the applicable statutes. A.R.S. §15-213 governs bidding and specification provisions to be employed in the award of construction contracts. That statute further provides for the establishment of uniform rules and regulations for bidding, all of which are to be established by the State Board of Education. Said rules have been adopted (R7-2-707(B)-1-5, Arizona, Official Compilation of Administrative Rules and Regulations). Neither the statutes nor the rules forbid the District from employing a minimum wage scale and, in fact, the rules and regulations of the State Board of Education specifically permit a district to reject a bid for "any reason it determines" (see, R7-2-707(B)-1(d)). The District being able to reject the bid for any reason, it therefore follows, at least arguably, that the District has the power to employ such specifications as it deems advisable so long as such specifications are not in violation of statute.

The above view is reinforced by the Opinion of the Arizona Court of Appeals, Division Two, in Roger v. Speros Construction Co., Inc., 119 Ariz. 289, 580 P.2d 750 (Ariz. App. 1978). In that case, the Ajo Public Schools required a contractor to pay certain minimum wages to its employees. The Arizona Court of Appeals held that the contractor and the school district could lawfully enter into such a separate "contractual agreement" and that pursuant to that "contractual agreement", the employees could sue as third party beneficiaries to receive the wage set forth in the minimum wage schedules. That case inferentially grants to the School District the power to employ such a provision in its contracts. It is therefore the opinion of this firm that Sunnyside Unified School District may establish its own minimum wage scale.

3. Procedures for Adoption of Minimum Wage Scale: I have set forth the procedures for adoption of such a minimum wage scale in answer to Question #3 above. I cannot, however, emphasize enough the requirement that such a scale be specific. By way of example, journeyman carpenter base wage and benefit package \$10.50 an hour. It is the type of

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specificity that will be required.

4. Potential Litigation: While I believe, based on the answer to Question #2 that the School District has the power to enforce such a minimum wage scale, it will doubtless be the subject of litigation by proposed bidders. We have no way of knowing whether or not the "low bidder" is going to pay the minimum wage until such time as he refuses to pay such wage. The relief that has probably been applicable is a separate suit by the employees under the doctrine set forth in Roger, supra. If we receive a bid which specifically excludes the specification for the payment of minimum wages, we obviously will have to take the position that such a bid does not conform to the call for bids and we will have to reject same.

#### CONCLUSION

The requirement to have a minimum wage scale or decision not to have one is solely a legislative function which is in the discretion of the Board. We obviously make no recommendation either way.

This opinion is being forwarded to the office of the Attorney General for concurrence or review pursuant to A.R.S. §15-436(B). Unless circumstances require immediate action upon this opinion, you should await my forwarding to you of the response of the Attorney General before acting on the opinions set forth above.

Sincerely yours,

STOMPOLY & EVEN, P.C.

John Patrick Lyons

JPL:de  
Enclosure

cc: Mr. Hector M. Encinas

## SUNNYSIDE UNIFIED SCHOOL DISTRICT NO. 12

ADMINISTRATIVE OFFICES • 2238 EAST GINTER ROAD  
P. O. BOX 11280 • TUCSON, ARIZONA 85734  
TELEPHONE 602-294-1411

August 3, 1982

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AUG 05 1982

STOMPOLY & EVEN

Mr. John Lyons  
Stompoly & Even P.C.  
P.O. Box 3017  
Tucson, Arizona 85701

Dear Mr. Lyons:

Your legal opinion is hereby requested regarding the legality and/or the right of the District to require contractors to pay the prevailing wage to its employees for school projects they bid on.

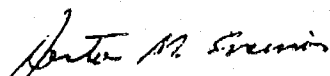
For sometime now, the District has specified in its "Contract and General Conditions" and included in the "Agreement Between The Architect and Owner" that the "prevailing wage" be paid.

On recent capital projects, we have specified that the "City of Tucson's Prevailing Wage Scale" be used in determining the pay of their employees. Since we have various major capital projects planned in the future, I require your legal expertise to answer the following questions:

- 1) Does the Board of Education/Sunnyside Unified School District have the right and therefore is on legal grounds to specify that contractors pay its employees the "City of Tucson's Prevailing Wage Scale" for projects in Sunnyside Unified School District?
- 2) If not to the above, can the District specify and obligate contractors to pay their employees based on a "Sunnyside Unified School District" prevailing wage scale?
- 3) If yes to #2, what steps and actions are required to establish a "Sunnyside Unified School District" prevailing wage scale?
- 4) If yes to #2, do you foresee any legal complications and/or challenges from contractors if we receive a bid from a contractor who is not going to pay the prevailing wage scale that is lower than the low bidder who has agreed to pay the prevailing wage?

If you desire any additional information and/or clarification pertaining to this request, please to not hesitate to write or call.

Sincerely,



Hector M. Encinas  
Director of Business Affairs